IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.12.2005

CORAM:-

THE HONOURABLE MR.JUSTICE N.PAUL VASANTHAKUMAR

Second Appeal No.1196 of 1993

Chinnu @ Pacha Gounder .. Appellant

Vs.

1.Periakaliammal @ Ponnammal (decd)
2.Chinna Kaliammal @ Poovathal
3.Sethuramasamy
4.Selvan (died)
5.Selvi
6.Santhi
7.Kavuku Chinthamani .. Respondents

(RR-3 to 6 are brought on record as L.Rs. Of the deceased 1st respondent vide C.M.Ps.14203 & 14204/96 by S.S.S.,J. Dated 18.03.1997)

(7th Respondent is brought on record as L.R.of the deceased 4th respondent vide order of Court dated 20.10.2004 made in C.M.P.Nos.15421 to 15423/1998)

This Second Appeal has been filed under Section 100 of Civil Procedure Code against the Judgment and Decree dated 28.01.1993 made in A.S.No.2 of 1990 on the file of the Subordinate Judge, Udumalpet, confirming the Judgment and Decree dated 07.12.1989 made in O.S.No.266 of 1985 on the file of the District Munsif Court, Pollachi.

For Appellant :: Mr.V.Karunakaran for Mr.T.P.Manoharan

For R-2, R-5 & R-6 :: Mr.S.Kadarkarai

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J U D G M E N T

Plaintiffs, who are the sisters of the defendant, filed O.S.No.266 of 1985 on the file of the District Munsif Court, Pollachi for declaring that they are the absolute owners of the suit properties described in the schedule with a consequential direction to the defendant to hand over possession of the suit properties to the plaintiffs within a specified time and in case of default, to permit the plaintiffs to take possession of the suit properties through the process of the Court.

2. The averments made in the plaint by the plaintiffs, who are the respondents in the Second Appeal are as follows: The suit properties, originally belonged to plaintiffs' mother by name Nachammal, under a sale deed dated 27.11.1937 and she was in possession and enjoyment of the suit properties till her life time. The said Nachammal (mother of the Plaintiffs and the defendant) died 40 years ago. Father of the plaintiffs and the defendant, by name Amaravathi Gounder also died in the year 1962. Hence, as per the law that existed prior to 1956, the plaintiffs being the daughters, have become entitled to the suit properties absolutely and the defendant who is their brother, was not entitled to any share in the suit properties. It is further stated that even though the defendant was not entitled to any share in the suit properties, as the defendant happened to be their brother, the plaintiffs permitted him to enjoy the suit properties along with them. It is further stated that the defendant, taking advantage of the said fact, started to behave indifferently and started to deny the right of the plaintiffs in the suit properties. For about a year prior to the suit, the defendant had been picking up quarrels with the plaintiffs frequently and thereafter, he demanded the plaintiffs to settle the properties in his favour. As the plaintiffs refused to oblige, the defendant started to show indifferent attitude. Thereafter, the plaintiffs demanded the defendant to hand over the suit properties to them. The defendant refused to hand over possession of the suit properties despite mediation that took place about one year prior to filing of the suit. Therefore, the plaintiffs filed the suit with the aforesaid prayer.

3. The suit was resisted by the defendant, who contended that the suit is not maintainable. He is the elder brother of the plaintiffs and he admits the sale deed dated 27.11.1937, executed in favour of his mother by his father. The sale of the properties to the mother of the

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plaintiffs and defendant was to repay the loan amount and even after such sale, the suit properties were in possession of their father. It is further contended that within 3 years from the execution of the sale deed dated 27.11.1937, the mother viz., Nachammal died and at that time the plaintiffs were minors. It is admitted in the written statement that as per the law then existed, the plaintiffs alone are entitled to get the mother's property. It is further stated that the first and second plaintiffs left the suit village after their marriage about 28 and 21 years ago, respectively. After the death of his father in the year 1962, the defendant was in enjoyment of the properties. It is further stated that either prior to marriage or after the marriage, the plaintiffs were not in possession and they never claimed their right over the properties. The defendant further states that in the year 1972, he dug a well and fixed motor pump sets and developed the land by planting coconut trees and only because of his efforts, the land value had increased. It is further stated that even though the plaintiffs are entitled to the properties of their mother, they never asserted their right and the defendant had derived title by adverse possession.

4. From the above pleadings, the following issues were raised and tried by the Trial Court:

> 1. Whether the defendant had proved his claim over the suit properties on the basis of adverse possession ?
>
> 2. Whether the plaintiffs are entitled to the relief of declaration and separate possession in respect of the suit properties, as claimed in the plaint ?
>
> 3. To what relief plaintiffs are entitled to ?

5. The Trial court examined the first plaintiff as P.W.1, and her cousin viz. Kaliappa Goundar as P.W.2 and marked the sale deed dated 27.11.1937 as Ex.A.1, which stands in their mother's name. The defendant examined himself as D.W.1; one of his cousins viz. Sivasami as D.W.2; his neighbour viz. Muthusami Goundar as D.W.3; and one Palanisami as D.W.4. Exs.B-1 to B-30 were marked on the side of the defendant. The Trial court, after consideration of the oral and documentary evidence, came to the conclusion that the plaintiffs are the legal heirs of their deceased mother, even though they are residing in different places subsequent to their marriage, and the defendant's possession cannot be termed as adverse possession and that it can only be treated as permissive possession. The trial court further found that the

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documents marked on the side of the defendant, namely, Exs.B-1 to B-30 are all of recent origin i.e. from 1984 onwards, which was just one year prior to the filing of the suit and the defendant's possession has not been proved to be adverse to the real owners viz. Plaintiffs. The Trial Court therefore decreed the suit in favour of the plaintiffs.

6. The said judgment was assailed by the defendant by filing A.S.No.2 of 1990 before the Sub court, Udumalpet and the first appellate court on reappraisal of the entire oral and documentary evidence found that the defendant was not in hostile possession of the suit property for over the prescribed period and consequently dismissed the appeal. Aggrieved by the same, this Second Appeal has been preferred by the defendant.

7. The following substantial questions of law were framed by this Court while admitting the Second Appeal.

> 1. Whether the present suit filed by the respondents viz., the heirs of Nachammal, after about 40 years from the date of death of the said Nachammal, was not barred by limitation, especially when admittedly the appellant was not a heir of Nachammal and he was not entitled to inherit the estate of Nachammal, viz., the suit properties along with the respondents and consequently his possession of the suit property for over 25 years prior to the date of suit was not as a co-sharer, but only as a trespasser ?
>
> 2. Whether the non-consideration of the entire oral evidence on record and non-consideration of the contents of the documentary evidence on record save making only a passing reference about the same by both the Courts below, would not amount to non-observance of the mandatory provisions of Order 41 Rule 31 C.P.C., and consequently such non-consideration had not brought in serious infirmity in its judgments and vitiated them ?

8. The learned counsel appearing for the appellant/defendant stressed the point that the trial court and the first appellate court have failed to consider the oral evidence of D.Ws.1 to 3 in their proper perspective and therefore, the findings given by the courts below cannot be sustained.

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9. Mr.S.Kadarkarai, learned counsel for the respondents/plaintiffs submitted that the trial court in paragraph 5 of its Judgment has stated that the suit was originally disposed of by the District Munsif Court, Pollachi and on appeal filed against the said judgment before the Sub Court, Udumalpet, it was remanded back to the trial Court to give sufficient opportunities to both the parties for letting in oral and documentary evidence to prove their respective claim in support of their case. Accordingly, the appellant/defendant was given ample opportunities to let in oral and documentary evidence, but even thereafter, the appellant/defendant failed to prove his claim of adverse possession. Learned counsel further states that the appellant had failed to prove his adverse possession factually, which is a concurrent finding given by the Courts below. He also submits that sitting in Second appeal, this Court cannot interfere with the concurrent findings of fact rendered by both the courts below and for this proposition, the learned counsel relied on the decisions reported in AIR 1999 SC 2213 (Kondiba Dagadu Kadam V. Savitribai Sopan Gujar), and 2000 (3) CTC 200 (Subba Reddiar V. Vasantha Ammal), wherein it is specifically held that the concurrent findings of fact shall not be set aside while dealing with the Second Appeal under Section 100 of Civil Procedure Code.

10. I have considered the rival submissions made by the respective learned counsel and the questions of law raised in this appeal. The findings of the Courts below are that the defendant, as brother, was in possession of the suit properties only along with the plaintiffs, therefore adverse possession cannot be claimed by the appellant/defendant. In the evidence of the first defendant as D.W.1, he admits that the suit properties belonged to his mother, which were purchased under the sale deed dated 27.11.1937 under Ex.A.1 and the plaintiffs, who are daughters, alone are entitled to get shares in the said properties after the demise of their mother, as per the law then in force.

11. It is stated by the learned counsel for the appellant/defendant that the Revenue and other records were not changed in defendant's name due to cordial relationship between the parties. D.W.2 stated that the defendant alone looked after the suit properties and developed the lands and further stated that the plaintiffs, after their marriage were residing in far away places. The said oral evidence on the side of the defendant would not establish and prove the uninterrupted, hostile possession of the suit properties by the defendant.

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12. It is settled law that a person who is claiming adverse possession, must prove that he is in open, continuous, uninterrupted and hostile possession, which is lacking in this case. As stated in the plaint as well as in the evidence, the defendant, being the brother of the plaintiffs, his possession of the suit properties is a permissive one. It is also to be noted that to claim adverse possession the person pleading the said right shall satisfy the ingredients of Articles 64 and 65 of the Limitation Act, 1963. While construing the said provisions a Division Bench of this Court in the Judgment reported in AIR 1980 Madras 33 = 1979 (2) M.L.J. 147 (P.Periasami V. P.Periathambi) at para 24 held that the question of adverse possession will arise only in cases of proved ouster and established assertions of sole and exclusive title and denial of title in others. The Apex Court in the decision reported in AIR 1966 SC 470 (Manikayala Rao V. Narasimhaswami) held that the question of adverse possession is one of facts. From the above cited judgments, it is very clear that it is for the person claiming adverse possession, to factually prove that he perfected the title by adverse possession.

13. The learned counsel appearing for the appellant/defendant cited the judgment rendered in RAMLAL VS. PHAGUA (2005 (5) CTC 282) for the proposition that even with regard to the concurrent finding of facts by two courts below, if the facts recorded are erroneous, the High Court under Section 100 Civil Procedure Code can re-appreciate the evidence and record its own conclusion by giving cogent and convincing reasons and reverse the findings which had been rendered by the courts below.

14. In this case, the claim of the appellant/defendant that his possession for well over 12 years has not been factually proved by him. There is evidence to show that the appellant/defendant was in possession of the suit properties only as permissive occupant and four years prior to the filling of the suit, the plaintiffs/respondents had visited the properties and enjoyed the properties. Such being the case, the appellant's claim of adverse possession for the prescribed period cannot be treated to have been proved.

15. The judgment cited by the learned counsel for the appellant/defendant has no application to the facts of the case as the appellant's case that he is in open, hostile, continuous and uninterrupted possession for well over 12 years has not been factually proved. The courts below have

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not only given findings on the basis of oral evidence but also on the basis of the documentary evidence filed by the appellant/defendant, which are of recent origin and came to the conclusion that the appellant has not proved his claim of adverse possession. Hence, it cannot be said to be a perverse finding.

16. The learned counsel for the respondents/plaintiffs brought to the notice of the court the judgment of a Division Bench of Patna High Court rendered in Ramkhelawan Singh Vs. Lalji Rai (AIR 1957 PATNA 155) and contended that even the relatives cannot claim adverse possession.

17. There being no question of law much less substantial question of law, the Second Appeal is dismissed and I hereby confirm the concurrent findings of the courts below. No Costs.

vr/gg

Sd/
Asst.Registrar

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Sub Asst.Registrar

To

The Subordinate Judge
Udumalpet (With Records)

2.The District Munsif
Pollachi

3.The Record Keeper VR Section, High Court
Madras

- one cc to Mr. T.P. Manoharan, Advocate sr no. 49774
- One cc to Mr. S. Kadarkarai, Advocate sr no. 49777

MME(CO)
NM(25.01.2006)

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